

No. 2407

IN THE
**United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

PUGET SOUND TRACTION,
LIGHT & POWER COMPANY, a
corporation,

Plaintiff in Error,

vs.

CHARLES J. SCHLEIF,

Defendant in Error.

PETITION FOR REHEARING

JAMES B. HOWE,

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Comes now the Puget Sound Traction, Light & Power Company and respectfully petitions the court for a rehearing and submits the following points for the consideration of the court:

(1) In the statement of facts in the opinion filed herein, this court says:

“He could have seen the car, had he been looking, at a distance of at least 600 feet. He testified that he was engaged about his work and was not looking, or thinking about the car, and did not hear the car approaching.”

In the opinion the court says:

“Error is assigned to the refusal of a requested instruction on the subject of the duty of the plaintiff to use his senses, his eyes and his ears, especially when working in or about a place where a collision with a car was likely to occur. But on examining the instructions, it is seen that the court charged the jury sufficiently on that branch of the case as follows: ‘And a person is required to make reasonable use of his eyes and ears; that is, he is required to look and listen for approaching cars when employed near the track and to do such acts as a reasonably prudent man would under like circumstances.’ ”

Your Honors thus holding that the instruction of the trial court to the effect that “a person is required to make reasonable use of his eyes and ears; that is, he is required to look and listen for approaching cars when employed near the track and to do such acts as a reasonably prudent man would under like circumstances,” is sufficient. It would appear therefore from Your Honors’ opinion that

a person is required to make reasonable use of his eyes and ears to look and listen for approaching cars when employed near the track and to do such acts as a reasonably prudent man would do under like circumstances. Your Honors properly conclude from the evidence that the defendant in error could have seen the car had he been looking for a distance of at least 600 feet, and that he was not looking or thinking about the car and did not hear the car approaching. It would seem from Your Honors' finding then the defendant in error exercised no care whatever, and yet it would appear from Your Honors' opinion that a person when employed near the track is required to make reasonable use of his eyes and ears and to look and listen for approaching cars. Having found that he did not exercise this care, and having approved the announcement of the trial judge that he should do so, it would seem logical that the defendant in error was guilty of contributory negligence. The announcement of the trial judge which is quoted with approval by this court is not new. While it is true that the doctrine of look and listen as applied to steam railways is not applicable to electric railways in a public street, "such a rule does not mean that one can heedlessly and carelessly cross the track without using his senses for his protection, nor does it mean that those who have eyes to see but see not and ears to hear but hear not are exercising due care."

Helleisen v. Seattle Elec. Co., 56 Wash. 278.

Your Honors will recall that the defendant in error was standing to the north of the manhole. His face, therefore, would be in the direction from which the car was approaching. All he had to do was to lift his eyes and he would have observed the car. It would appear improbable for a person standing in such a position to avoid seeing the car approaching. Again, even if no gong were sounded the plaintiff in error contends that a heavy street car going at the rate of speed that defendant in error contends, independent of the sounding of any gong, would make such an amount of noise that the defendant in error had he given the slightest heed must have heard it. While it was true that he was engaged at work it does not appear that the work was of such an unusual character as to have drowned the ordinary noise of an approaching car.

“We know that a heavy modern street car, running at fifteen or more miles an hour in an outlying district of the city, no traffic upon the streets, no interfering noises, will make some noise as it approaches,” etc.

Armstrong v. Spokane and Inland Empire Ry. Co., 71 Wash. 624, 628.

“While we do not judicially know how much noise a moving street car makes, nor how far it can be heard, we do know that in a quiet, deserted street it can be heard for a considerable distance, in fact, several hundred feet, and

that the noise is sufficient to attract the attention of any one whose mind is not so preoccupied with something else as to exclude it."

Riedel v. Wheeling Traction Co., 61 S. E. 821, 826, 63 W. Va. 522.

"Nature has provided two senses for personal protection, the use of either of which might have given plaintiff warning of the approaching car; for it is of common knowledge that a trolley car in motion makes, by friction with the track, a noise more or less audible, and that, as the wheel of the trolley pole runs along the wire overhead, a whirring sound is caused, increasing in intensity with the speed of the car. One of the plaintiff's witnesses testified that the car was going at a high rate of speed, and, this being assumed, the whir must have been noticeable. If the plaintiff had listened, he might have heard both of these sounds. So, also, a car in motion has the electric current at work, and, after dark, the electric lamps lighted. It taxes credulity to believe that, if the plaintiff had either looked or listened, he would not have become aware of the proximity of the car."

Quinn v. Brooklyn City Ry. Co., 57 N. Y. Supp. 544, 546.

This Court cites in its opinion the case of *Hanley v. Boston Elevated Railway*, 201 Mass. 55. The plaintiff in error believes that a rereading of that

opinion when considered with the facts in this case removes that decision from an authority herein, and that the decision therein ought not to be held as exonerating the defendant in error from his own carelessness in this case. In *Hanley v. Boston Elevated Railway, supra*, the injured person was a member of a gang of workmen engaged in repairing a gas main. The railway had stationed a flagman in the vicinity whose duty apparently was not only to warn travelers on the street to avoid the danger, but also to warn the men at work when cars were approaching on the track, and that previous to the approach of the car which caused the accident, this flagman had notified the injured party whenever a car was coming. In reference to this phase the court said:

“If before the flagman came the plaintiff looked out for himself, it cannot be said as matter of law that after his arrival he was negligent because to quite an extent he relied upon the warning from him instead of relying entirely upon his own observations. The flagman, among other duties, attended for this very purpose, and had previously warned the plaintiff of the approach of cars until just before the accident. If the defendant did not intend the plaintiff or his fellows to understand that they were to be warned when cars were to pass, then having misled the plaintiff to his harm it should not be permitted to turn around and

say that notwithstanding its conduct the plaintiff took his chances and should have depended entirely upon himself."

In the present case the defendant in error had relied upon his own observation to determine whether a car was approaching or not. The plaintiff in error had not in any wise misled the defendant in error. It was incumbent upon him to look out for himself. Again it would appear from the decision in said case that the injured person was working at a place where he would be struck unless "he leaned far over enough to his left hand as they (cars) passed." In the present case the defendant in error, admittedly, as stated in Your Honors' summary of the facts, "was standing north of the center of the hole and at a point where a car approaching from the south on the easterly track could easily pass him." Again it is apparent from the opinion in the Hanley case that the flagman knew of the excavation and that the plaintiff was obliged to stand on the top of the pipe, which naturally might become slippery and consequently in the performance of his work the plaintiff might lose his balance and reach over and hold onto the rail to prevent himself from falling, and, as indicated near the close of the opinion that the combination of circumstances out of which the accident arose left it as a question for the jury to determine whether or not it was reasonably unforeseeable. In the

present case there was nothing about the combination of circumstances out of which the accident arose from which it could be said that the operators of the car might reasonably foresee that the defendant in error would step upon an unsupported board and to avoid falling into the manhole jump onto the track. We have no quarrel with the decision in the case of *Hanley v. Boston Elevated Railway, supra*, but counsel for the plaintiff in error respectfully submit that the defendant in error does not occupy a sufficiently favorable position under the evidence in this case to entitle him to the benefits of that decision.

(2) Counsel for plaintiff in error also respectfully submit that since the defendant in error was in a place where "the car could easily pass him," the alleged excessive speed and failure to sound the gong were not the proximate causes of the accident. If the car had been going twelve miles per hour at the time that the defendant in error involuntarily, if he did so, stepped upon the track, there is no evidence or contention that the car could have been stopped in time to have avoided the accident. Therefore the excessive speed could not be the proximate cause of the accident. The accident would have occurred beyond doubt had the car been going at a rate of speed considerably less than twelve miles per hour. Again to say that if the gong had been sounded, taking no notice of the well known fact that a car weighing many

tons, going at a considerable speed makes considerable noise and can be heard for blocks, gave no warning by sounding the bell until the defendant in error jumped on the track was the proximate cause of the accident allows the jury to enter the realm of speculation. A person acting involuntarily in order to avoid falling into a hole is just as liable to step in front of the car as otherwise.

Juries cannot be permitted to determine the proximate cause of accidents by entering into the realm of speculation or conjecture.

Armstrong v. Town of Cosmopolis, 32 Wash. 110.

The following citation from the case of *Hyer v. Janesville*, 101 Wis. 371, is approved by the Supreme Court of the State of Washington in the case of *Reidhead v. Skagit County*, 33 Wash. 174, 180:

“It has been said by this and other courts repeatedly, and is the established law, that a jury cannot properly be allowed to determine disputed questions of fact from mere conjecture. There must be some direct evidence of the fact, or evidence tending to establish circumstances from which a jury would be warranted in saying that the inferences therefrom clearly preponderate in favor of the existence of the fact, else the question should not go to the jury for determination at all. To allow a jury to reach a conclusion in favor of the

party on whom the burden of proof rests, by merely theorizing and conjecturing, will not do. There must at least be sufficient evidence to remove the question from the realms of mere conjecture, else the trial court should pronounce the judgment of the law on the situation by taking the case from the jury when requested so to do.”

At best it can only be claimed that had the defendant in error’s evidence shown that the bell of the car had been sounded then he might not have involuntarily jumped on the track. Is not that only a possibility? Does not that allow the jury to speculate as to the proximate cause of the accident? The plaintiff in error refers to the authorities in its brief on pages 20-27, inclusive, as showing that it is not sufficient to simply establish negligence against the plaintiff in error, but it must further affirmatively appear that such negligent acts were the proximate causes of the accident.

III.

The defendant in error himself recognizes that his employment was covered by the Workmen’s Compensation Act. Why? Because he presented a claim to the State under and in accordance with that act. And further, thereafter in accordance with said act, attempted to elect to sue the alleged

negligent third party. In this respect the plaintiff in error contends, that by presenting his claim to the State, the defendant in error elected to look to the State for compensation. But he did more than that. He received from the State at least two documents that it rested within his power to convert to his own use. The State requested that these documents be returned. Up to the time of the trial of this action he had not returned them. Why? Plaintiff in error contends that he was speculating upon the outcome of this suit and had he lost this suit he would then have attempted to obtain the benefits of the State's award. If such were his purposes might not a jury reasonably say that he had made a definite and final claim to the State? The plaintiff in error is not disposed to contend that as a matter of law defendant in error's conduct was such as to estop him from suing the plaintiff in error but what plaintiff in error does contend is that his conduct was such that a jury might reasonably believe, and might properly find, required him to look to the State of Washington for his compensation. Apparently Your Honors' opinion disposes of this contention on the theory that as a matter of law defendant in error has not estopped himself from prosecuting this action. The plaintiff in error contends that there was a question of fact at least for the jury to say whether or not his conduct amounted to an election to recover from the State.

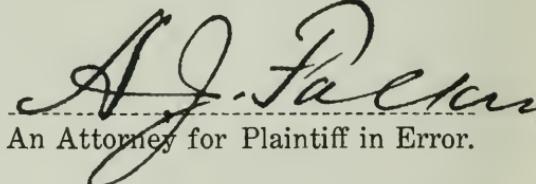
Plaintiff in error respectfully submits the foregoing Petition for Rehearing and asks that a rehearing be granted and for such relief as it has heretofore prayed.

Respectfully submitted,

JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Plaintiff in Error.

STATE OF WASHINGTON, }
COUNTY OF KING. } SS.

I HEREBY CERTIFY that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.


An Attorney for Plaintiff in Error.